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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/996,954	11/30/2001	Harlan W. Waksal	IMCLON 3.0-003 CIPCONCONI	3116
77405	7590	01/30/2009	EXAMINER	
IMCLON			HOLLERAN, ANNE L	
Lerner, David, Littenberg, Krumholz & Mentlik, LLP				
600 South Avenue West			ART UNIT	
Westfield, NJ 07090			PAPER NUMBER	
			1643	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

09/996,954

Applicant(s)

WAKSAL, HARLAN W.

Examiner

ANNE L. HOLLERAN

Art Unit

1643

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 01 December 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 71-79, 81-87, and 89-102.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/Alana M. Harris, Ph.D./  
Primary Examiner, Art Unit 1643

Continuation of 3. NOTE: Applicant raises the issue of secondary considerations of non-obviousness and provides Venook for consideration for the first time. This will require further consideration and search.

If the amendment were entered, which it is NOT: the rejection of claim 91 under 35 USC 112, first paragraph would be obviated; and the rejection of claims 86 and 87 under 35 USC 102(b) would be withdrawn.

Continuation of 11. If the amendment were entered, which it is NOT: the amendment would NOT place the application in condition for allowance because: Claims 71-79, 81-85, 90, 92, 96 and 98-102 would remain rejected under 35 USC 102(b) as being anticipated by Bos, as evidenced by Herbst, for the reasons of record. Applicant states that the examiner has ignored the standard for anticipation, and that applicant need not prove that Bos' patients were in fact treatment-naïve. Further, applicants state that while applicant agrees that the examiner has provided a reason why one or more patients in Bos might have had a refractory cancer, the examiner has not provided reasoning as to why the patients necessarily had refractory cancer. This argument does not persuade because the claims recite one method step of administering to "a human", without concomitant chemotherapy or radiation therapy, an EGFR antagonist, wherein the EGFR antagonist is an antibody or fragment thereof which specifically binds to EGFR, wherein administration is effective to inhibit the growth of a refractory cancer. Thus, Bos teaches the same method step, because Bos teaches the administration to a human an anti-EGFR antibody without concomitant chemotherapy or radiation therapy. Therefore, the examiner does not have to provide reasoning for why the patients of Bos necessarily had refractory cancer. However, the rejection of record does address whether the method of Bos would have been effective to treat patients with refractory cancer. The rejection of record cites Herbst as an evidentiary reference that teaches that head-and-neck cancer is generally refractory to treatment. One of the categories of patients treated in Bos is that of head-and-neck cancer. Further, Bos teaches that all of the patients are "advanced" cancer patients, which is a category of patients that includes patients that have relapsed from a previous treatment. Applicant points to claims 86 and 87, which recite humanized antibodies, where the six CDRs are of a non-human animal antibody and the framework variable region is of a human antibody, and states that Bos does not teach the use of such antibodies. With respect to these two claims the rejection would be withdrawn, and these claims would then be rejected under 35 USC 103(a). Applicants argue that Bos does not teach that tumor growth is inhibited. The claims recite the same step as the administration step taught in Bos. The inhibition of tumor growth flows from the administration step. If Bos teaches the same step, then the same outcome should be expected. However, the rejection of record does address the effects reported in Bos by pointing to the statement in Bos that two of the head-and-neck cancer patients had minor responses.

If the amendment were entered, which it is NOT: Claims 71 and 89 would remain rejected under 35 USC 103(a) as being unpatentable over Bos as evidenced by Herbst and in view of Suran for the reasons of record; claims 71 and 93-95 would remain rejected under 35 USC 103(a) as being unpatentable over Bos, as evidenced by Herbst, and in view of Ladner for the reasons of record; and claims 71 and 97 would remain unpatentable over Bos in view of Malecka-Panas, and Radinsky for the reasons of record. As pointed out above, the claims recite a single method step of treating a human with an anti-EGFR antibody, and Bos provides this step. With respect to claim 89, Bos does not teach use of human antibodies, but such antibodies are known in the prior art as evidenced by the teachings of Surani. Applicant's arguments do not address the specific limitation of human antibodies, and when discussing secondary considerations of non-obviousness, including long-felt need or unexpected results, applicant fails to relate these to the specific limitation of the use of fully human antibodies. With respect to claims 93-95, Bos does not teach the use of fragments, but the use of antibodies fragments that bind to antigens such as EGFR are known in the art, and when discussing secondary considerations of non-obviousness, including long-felt need or unexpected results, applicant fails to relate these to the specific limitation of the use of antibody fragments. With respect to claim 97, applicants state again that Bos does not teach treatment of tumor growth inhibition for patients with refractory tumors. However, the claims recite an active step of treating "a human", where the intended use is to treat refractory tumors. Applicant discusses Venook to summarize the state of the art regarding colon cancer treatment published within a few years of the priority date of the captioned application to support the argument that there was a long-felt need to treat refractory colon cancer patients. The consideration Venook and secondary considerations of non-obviousness of treating colon cancer is new with the filing of the after-final amendment, and will not be considered here.